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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 158

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL.,
Petitioners,

vs.

JOHN P. O'CONNELL, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

QUESTION PRESENTED.

Whether Section 2, Eleventh (c) of the Railway Labor Act, 45 U. S. C. 152, Eleventh (c), should be construed literally so that full effect is given to its clear and unambiguous language providing that membership of an operating employee in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership operating employees, satisfies the membership requirements of any collective bargaining agreement applicable to operating employees, without implying that the satisfying membership is limited to a labor organization which holds a contract for a craft or class in which the employee has an expectation of employment.

STATEMENT.

Nature of the Case.

This is a suit for injunction, declaratory judgment and damages filed by three yard service employees and four conductors of the Erie Lackawanna Railroad Company who sued on behalf of themselves and all other members of the Switchmen's Union of North America, AFL-CIO and of the Order of Railway Conductors and Brakemen, who are employed by that railroad. The complaint alleged that the railroad had entered into union shop contracts which violate Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act, as amended, 45 U. S. C. 152 (R. 48a-58a). Federal jurisdiction was invoked under United States Code, Title 28, Section 1337, conferring jurisdiction on federal district courts of any civil action or proceeding arising under any act of Congress regulating commerce and under Section 2201 of the Federal Declaratory Judgment Act, 28 U. S. C. 2201.

The Parties.

This suit as originally filed in the district court had as parties plaintiff the Switchmen's Union of North America, AFL-CIO, and three yard service employees of the Erie Lackawanna Railroad Company who sued on behalf of themselves and on behalf of all members of the Switchmen's Union of North America, AFL-CIO, who are employed by the Erie Lackawanna Railroad Company (R. 48a-50a). The complaint alleged as follows: More than 500 members of the Switchmen's Union are employed by the Erie Lackawanna (R. 30a, 50a) and hence constitute a class so numerous as to make it impossible to bring them

before the court in person (R. 50a). The three individuals have been employed by the defendant Erie Railroad or its predecessor for respectively 25 years, 31 years and 19 years and have been members of the Switchmen's Union for respectively 15 years, 29 years and 15 years (R. 49a-50a). Many of the plaintiffs and the class they represent hold valuable insurance rights which depend on their continued membership in the Switchmen's Union (R. 54a-55a). The constitution of the Trainmen's Union would not permit membership in the Trainmen's Union and the Switchmen's Union at the same time (R. 54a). Hence if plaintiffs and other members of the class they represent are required to become members of the Trainmen's Union they will lose valuable insurance rights (R. 54a-55a).

After Judge Herlands had entered the preliminary injunction in the district court, the Order of Railway Conductors and Brakemen and four of its members suing on behalf of themselves and on behalf of all other more than 225 members of the Order of Railway Conductors employed by the Erie Lackawanna applied for leave to intervene on the ground that they were in exactly the same situation as the original plaintiffs. The individual intervenor-plaintiffs have periods of employment on Erie Lackawanna ranging from 23 to 25 years and of membership in the Order of Railway Conductors ranging from four to thirteen years. The individual intervenor-plaintiffs and members of their class also hold valuable insurance rights which will be lost if they are required to cease being members of the Conductors and become members of the Trainmen's Union since the constitution of the Trainmen's Union bars membership in both the Conductors and the Trainmen. Judge Murphy granted the motion to intervene. By stipulation entered into in the Chambers of Judge Wyatt, the parties agreed that the preliminary injunction in favor of the original

plaintiffs would have like applicability to the intervenors-plaintiffs (R. 26a, 170a).[1]

The defendants named both in the original complaint filed by the Switchmen's Union and its members and the complaint filed after the Order of Railway Conductors and its members were permitted to intervene as intervenors-plaintiffs, are the Erie Lackawanna Railroad Company, the Brotherhood of Railroad Trainmen, the Vice President of the Trainmen's Union and the General Chairman of the Trainmen's Union sued in both their individual and representative capacity on behalf of all members of the Trainmen's Union (R. 51a).

History of Status of Switchmen's Union and Conductors Union on the Erie Lackawanna Railroad.

For many years prior to the merger of the Delaware, Lackawanna & Western R. R. Co. and the Erie Railroad in October, 1960, the Switchmen's Union had been the duly designated and recognized representative of the craft or class of yard foremen, helpers and switchtenders employed by the Delaware, Lackawanna & Western R. R. Co., while the Brotherhood of Railroad Trainmen represented these crafts and classes on the Erie Railroad (R. 30a, 51a).

Following the enactment of the Union Shop Amendment to the Railway Labor Act in January of 1951, and at all times thereafter until the merger of the two roads, each the Switchmen's Union's contract with the Delaware Lackawanna & Western R. R. Co. and the Brotherhood of Railroad Trainmen's contract with the Erie Railroad contained union shop provisions which conformed in all respects to

1. While the petitioners have not seen fit to print any of the documents pertaining to the intervention, they establish that the position of the intervenors-plaintiffs is in all respects identical to that of the original plaintiffs, as the district court found (R. 27a).

the provisions of Section 2, Eleventh of the Railway Labor Act as amended (45 U. S. C. 152, Eleventh) and contained the express provision that membership in any one of the labor organizations national in scope, organized in accordance with the Railway Labor Act, and admitting to membership employees in any of the services or capacities covered by the First Division of the National Railroad Adjustment Board should satisfy the requirements for membership of the union shop provisions (R. 30a, 51a-52a). The union shop provisions of the Brotherhood of Railroad Trainmen's contract was at all times construed and applied so that membership in either the Switchmen's Union or in the Order of Railway Conductors satisfied the requirement for membership (R. 51a-52a). During this period more than 500 yard service employees maintained membership in the Switchmen's Union without joining the Trainmen (R. 30a) and since then 225 conductors and trainmen maintained membership in the Order of Railway Conductors without joining the Trainmen. The union shop provisions of the Switchmen's Union's contract was at all times construed and applied so that membership in the Brotherhood of Railroad Trainmen satisfied the requirement for membership (R. 52a).

Following the merger of the two railroads the National Mediation Board conducted an election among all the yard service employees of the merged railroads which was won by the Brotherhood of Railroad Trainmen receiving 43 votes more than the Switchmen's Union out of a total of 1943 votes cast by eligible voters in the craft or class of yard service employees (R. 52a). The Brotherhood of Railroad Trainmen and the Erie Lackawanna Railroad Company from 1960 until March 14, 1967 construed and applied the union shop provisions of the Trainmen's contract with the railroad as satisfied by membership in either the Switchmen's Union or in the Order of Railway Conductors and

more than 500 employees of the railroad employed in the craft or class of yard foremen, helper and switchtender continued at all times to be members of the Switchmen's Union and did not join or maintain membership in the Brotherhood of Railroad Trainmen (R. 52a-53a). Similarly more than 225 employees of the railroad employed in the craft or class of conductor and brakeman continued at all times to be members of the Order of Railway Conductors and did not join or maintain membership in the Brotherhood of Railroad Trainmen.

The Illegal Union Shop Contracts.

On March 14, 1967 the Erie Lackawanna Railroad Company and the Brotherhood of Railroad Trainmen entered into a collective bargaining agreement effective immediately which provided (R. 59a):

> "It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N. J., Newark, N. J. and Dundee, N. J., Port Jervis, N. Y., Middletown, N. Y., Newburg, N. Y., Syracuse, N. Y., Utica, N. Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: . . ."

On April 4, 1967 the Erie Lackawanna Railroad Company and the Brotherhood of Railroad Trainmen entered into a similar union shop agreement which required all conductors, ticket collectors, baggagemen and trainmen employed by the Erie Lackawanna Railroad Company, former Erie District, to become and remain members of the

Brotherhood of Railroad Trainmen as a condition of continued employment (R. 20a, 168a-169a).

Neither of these agreements contains the provisions set forth in Section 2, Eleventh (c) of the Railway Labor Act which require that membership in any other union national in scope organized in accordance with the Railway Labor Act which admits employees in yard service to membership shall satisfy the requirement of membership in a labor organization which has a union shop agreement. The Brotherhood of Railroad Trainmen and Erie Lackawanna Railroad Company have threatened to discharge John P. O'Connell, R. A. Gallo and Charles Doyle and all the other members of the Switchmen's Union and the individual intervenors-plaintiffs and other members of the Conductors who are employed by the railroad unless they cease to be members of the Switchmen's Union and the Order of Railway Conductors and become and remain members of the Brotherhood of Railroad Trainmen (R. 55a).

The constitution of the Brotherhood of Railroad Trainmen, by Section 132 thereof (R. 65a), does not permit the plaintiffs or intervenors-plaintiffs or any other members of the Switchmen's Union or of the Order of Railway Conductors to become and remain members of the Brotherhood of Railroad Trainmen because each the Switchmen's Union and the Order of Railway Conductors is actively engaged in seeking to gain representation rights for employees employed by the Erie Lackawanna Railroad Company and now represented by the Brotherhood of Railroad Trainmen (R. 31a-32a, 54a).

Each the Switchmen's Union and the Order of Railway Conductors has at all times been a labor organization national in scope, organized in accordance with the provisions of Section 2 of the Railway Labor Act, as amended (45 U. S. C. 152) and as such has continuously since adop-

tion of the 1934 amendments to the Railway Labor Act (48 Stat. 926), participated in the selection and designation of the labor members of the National Railroad Adjustment Board (R. 25a, 40a).

Opinions and Judgment Below.

The main opinion in the district court is that of Judge Herlands granting the plaintiffs' motion for a preliminary injunction (R. 29a-47a). Judge Herlands held that the union shop agreements here involved violated the Railway Labor Act because they failed to contain a provision permitting membership in any one of the unions national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board, to satisfy the membership requirements of the contracts as required by the literal language of Section 2, Eleventh (c) of the Railway Labor Act as amended (R. 34a-47a). Judge Herlands, in a scholarly and completely annotated opinion (R. 29a-46a), reviewed the legislative history of the union shop amendment to the Railway Labor Act and pointed out that Congress rejected an amendment proposed by the Brotherhood of Railroad Trainmen which was worded in the manner which would sustain the validity of the union shop contracts here involved (R. 36a-44a). Instead, Congress adopted a carefully worded amendment which had been drafted by the unions themselves and which preserved under union shop conditions the pre-existing practice among operating unions "of having substantial enclaves of minority union members existing in the jurisdiction represented by the majority union" (R. 41a).

Judge Palmieri in granting the motion for summary judgment for plaintiffs and intervenors-plaintiffs adopted Judge Herlands' opinion (R. 24a-28a).

The judgment entered declared that the union shop agreements of March 14, 1967 and April 4, 1967 violate Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act (45 U. S. C. 152, Third, Fourth, Fifth, and Eleventh) and included a permanent injunction enjoining and restraining the Erie Railroad from discharging or threatening to discharge, and enjoining and restraining the defendant Trainmen from causing or attempting to cause the discharge of, any employee of the Erie Lackawanna Railroad Company for failure to join or maintain membership in the Brotherhood of Railroad Trainmen so long as he maintains membership in the Switchmen's Union of North America or in the Order of Railway Conductors (R. 20a-22a).

On appeal, the United States Court of Appeals for the Second Circuit affirmed (R. 19a). Its opinion contains a careful analysis of the legislative history of the provisions of Subsection (c) of Section 2, Eleventh (R. 9a-15a). As a result the Court stated (R. 7a):

> "We agree with Judge Herlands that there is no compelling indication of legislative intent contrary to the clear words of the statute, nor are the results of construing the words as they were written so absurd as to require the strained construction for which appellant [Brotherhood of Railroad Trainmen] contends."

The Second Circuit concluded (R. 9a):

> "We believe that the legislative history of the section shows that it was meant to permit membership in any union national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board to satisfy the union shop requirement of a contract pursuant to Section 2, Eleventh of the Railway Labor Act."

The Second Circuit rejected the contention that *Pennsylvania Railroad* v. *Rychlik*, 352 U. S. 480 (1957) required a holding that the alternate permissible membership was confined to a union holding a contract for a craft or class which the employee could expect, in the course of normal ebb and flow between crafts, to flow to or from (R. 15a-17a). Referring to the dictum in *Rychlik* that the only purpose of subparagraph (c) was to meet the problem of dual unionism in intercraft mobility, the Second Circuit observed that intercraft mobility presents two aspects, only one of which was adverted to in *Rychlik* (R. 16a). The other aspect, which gives meaning to a literal reading of subparagraph (c) arises when the ebb or flow results in a change in the majority union. The Second Circuit pointed out that during the sixteen year period immediately preceding the enactment of subparagraph (c) "there were 544 instances on 64 different railroads in which, through demotions or promotions due to changed employment conditions or through union recruiting, a minority union in a craft achieved a majority and as a result took over the contract traditionally held by another union" (R. 17a). Thus the unions were accustomed to the existence of enclaves of minority union representation which the unions wished to perpetuate under union shop conditions. Subparagraph (c) was drafted to preserve this historic practice (R. 17a).

The contention that a literal reading of subparagraph (c) conflicts with the purpose to prevent "free riders", was answered by the Second Circuit as follows (R. 18a-19a):

> "But we cannot say that the scheme adopted by Congress, which permits membership in any of the unions which jointly share the duty of administering the machinery of the National Railway Labor Act is inconsistent with that purpose. It is quite conceivable that Congress intended to implement its scheme through a system of reciprocal gains and losses among the various operating unions. While the Brotherhood of

Railroad Trainmen does not collect dues from some of the employees of the Erie Lackawanna whom it represents, concededly it collects dues from employees of other railroads who are represented by other operating unions."

SUMMARY OF ARGUMENT.

I. The literal language of Section 2, Eleventh (c) of the Railway Labor Act is clear and unambiguous. All parties concede that if the language is read literally or given its natural meaning the union shop agreement here before the Court is invalid.

A. Section 2, Third of the Railway Labor Act prohibits union shop agreements which do not permit membership in any of the unions national in scope to satisfy the membership requirement in lieu of membership in the contracting union. The three separate provisions of Subparagraph c of Section Eleven state the extent to which a union shop agreement is legal. First, it states that membership requirements in any union shop applicable to operating employees shall be satisfied by membership in any of the standard operating unions. Second, it states that any employee who is not a member of one of these unions when a union shop goes into effect may be required to join the contracting union. Third, it states that nothing in the statute shall prevent any operating employee from changing his membership between the various operating unions. As this Court pointed out in *Felter* v. *Southern Pacific Co.*, 359 U. S. 326, 336-337 (1959), subparagraph (c) establishes "the area that the Act leaves open for solicitation by rival organizations" and provides "the area where even a worker under a union shop arrangement can change affiliations."

B. The legislative history establishes that Congress rejected proposals which expressly delimited the right to alternative membership as set forth in the agreement held invalid by the courts below. Rather than so limit the ex-

ceptions to a strict union shop the labor committees of both the Senate and the House reported an amendment which would have permitted membership in any union to satisfy any union shop agreement applicable to railroad employees. The operating unions opposed this amendment and themselves drafted as a substitute for each of the prior proposals the language of Section 2, Eleventh (c) which permits instead of membership in any union, only membership in a standard operating union, to satisfy the membership requirements of a union shop agreement applicable to operating employees. Congressmen on the floor of Congress in debate preceding adoption made it clear they understood the bill they were passing gave operating employees full freedom to choose which of the five operating brotherhoods they wished to join and in which to maintain membership.

C. For fifteen years following its enactment all railway unions and all railroads, courts and administrative agencies construed and applied the union shop amendment to the Railway Labor Act to permit of no restriction on the right of any operating employee to choose in which of the five operating unions he desired to maintain membership. This contemporaneous construction followed by the unions which drafted the language of Section 2, Eleventh (c) establishes it was intended to be read literally. It cannot be assumed the draftsmen misunderstood their draft.

D. Membership in any one of the five standard operating unions contributes to the financial support of the collective bargaining apparatus applicable to operating employees approximately equally as much as membership in any other. The five unions act jointly not only in the resolution of grievances through the National Railroad Adjustment Board but in major nationwide movements for wage increases and fringe benefits. Both before and after the adoption of the union shop amendment, collective bargaining on the railroads with respect to operating employees

was conducted on a national basis with all five operating unions sharing the costs. Membership in any one served the purpose of eliminating the "free rider".

E. The Trainmen's present construction of Section 2, Eleventh (c) reads the last proviso out of the statute. If the only purpose was to prevent an employee who ebbed and flowed between crafts from being required to change his membership to meet the union shop requirements of each craft, Congress would never have provided that nothing in any agreement shall prevent an employee from changing his membership from one operating union to another. This proviso manifests the Congressional intent to preserve full freedom to operating employees to move freely from one operating union to another without any restrictions from any union shop agreement.

F. Nothing in *Pennsylvania Railroad* v. *Rychlik*, 352 U. S. 480 (1957) or *Rohrer* v. *Conemaugh & Black Lick Railroad Co.*, 359 F. 2d 127 (3rd Cir. 1967) constitutes a precedent for construing Section 2, Eleventh (c) as permitting a union shop agreement to require an operating employee to belong to one of the standard operating unions rather than another. In neither case was this issue before the Court. Every case which has presented this issue has been decided in favor of a literal reading of Section 2, Eleventh (c).

II. A construction of Section 2, Eleventh (c) which permits union shop agreements to restrict employees to membership in either the contracting union or some other union having a contract for a craft or class related to their craft or class, makes Section 2, Eleventh (c) meaningless. If employers are uncertain as to the right to an alternate membership, the fear of loss of employment will force them to join the contracting union. The absence of any clear cut definition of the available alternate membership means there will be no alternate membership, as a practical matter.

ARGUMENT.

I.

THE RAILWAY LABOR ACT PROSCRIBES AS ILLEGAL ANY UNION SHOP AGREEMENT APPLICABLE TO OPERATING EMPLOYEES WHICH DOES NOT PERMIT SATISFACTION OF THE MEMBERSHIP REQUIREMENT BY MEMBERSHIP IN ANY ONE OF THE UNIONS, NATIONAL IN SCOPE REPRESENTING OPERATING EMPLOYEES.

In both of the courts below the Brotherhood of Railroad Trainmen conceded that it can only prevail if the courts reject a literal reading of subparagraph (c) of Section 2, Eleventh. In the district court, as the opinion of Judge Herlands pointed out (R. 34a), the Brotherhood of Railroad Trainmen "frankly conceded upon oral argument—as it was obviously compelled to do—that the union shop clause of the new collective bargaining agreement would violate Section 2, Eleventh (c) of the Railway Labor Act if the latter were construed literally." In the Second Circuit the concession of the Brotherhood of Railroad Trainmen in that Court was stated in the opinion of the Court as a concession "that if the words of Section 2, Eleventh of the Railway Labor Act are given their natural meaning, the agreement is invalid" (R. 6a).

In this Court the Brotherhood of Railroad Trainmen makes no effort to support its position by the language of the statute but instead makes the type of a policy argument which should be directed to Congress rather than to this Court. Even this argument of the Brotherhood of Railroad Trainmen rests in large part on assumptions of fact neither supported by the record in this case nor judicially noticeable. See for instance the statement (Pet. Br., p. 8)

that one of the "disadvantages flowing" from the interpretation adopted by the courts below is that "The union dues of most employees must be higher to compensate for the loss of dues paid to outside unions." But as the Second Circuit pointed out in its opinion in this case, all five unions in which alternate membership is sanctioned, "jointly share the cost of administering the machinery of the National Railway Labor Act" (R. 18a) and to the extent that "the Brotherhood of Railroad Trainmen does not collect dues from some of the employees of the Erie-Lackawanna whom it represents, concededly it collects dues from employees of other railroads who are represented by other operating unions" thus creating "a system of reciprocal gains and losses among the various operating unions" (R. 18a).

Before answering the other inaccuracies in the brief of the Brotherhood of Railroad Trainmen, we shall first show that the language used by Congress is completely precise and accords fully with the Congressional intent.

A. Section 2, Third of the Railway Labor Act Prohibits All Union Shop Contracts Which Do Not Permit Satisfaction of the Membership Requirement for Any Operating Employee by Membership in Any One of the Unions, National in Scope, Representing Operating Employees as Required by Section 2, Eleventh (c).

As each Judge Herlands (R. 34a), Judge Palmieri (R. 27a) the Second Circuit in this case (R. 9a), the Seventh Circuit in the *Dirks* case, 391 F. 2d at p. 290, held, the literal language of Section 2, Eleventh (c) of the Railway Labor Act is violated by any contract requiring membership in the contracting union which does not permit satisfaction of the membership requirement by membership in any one of the unions, national in scope, representing operating employees.

Prior to 1951 the Railway Labor Act made all union shop agreements illegal. This was accomplished by the absolute prohibition upon employer interference with, influence or coercion of employees in the choice of their representatives which was set forth in Section 2, Third of the Railway Labor Act (45 U. S. C. 152, Third). This section reads:

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence or coercion seek in any manner to prevent the designation of its employees as their representatives of those who or which are not employees of the carrier."

In 1951 Congress made an exception to the foregoing section to permit a limited form of union security. Congress retained Section 2, Third as above quoted without change but added subdivision Eleventh to Section 2. For the purposes of this case the pertinent statutory provisions are subsections (a) and (c) of Section 2, Eleventh (a) and (c), which read as follows (45 U. S. C. 152, Eleventh):

> "Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this act shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days, following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; * * *
>
> * * * * * *

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of Subsection (h) of Section 153 of this chapter, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employees, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him. *Provided, further,* that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

There could hardly be a clearer statement that the only instance in which a union representing yard service employees can require an employee to join that union, as opposed to one of the other unions national in scope representing operating employees, is when that employee is not a member of any such union, on the effective date of the agreement, he may be required to join the contracting union. This is explicitly provided by the next to the last proviso clause in Section 2, Eleventh (c). And

even such an employee, as well as any other employee, may thereafter change his membership to any of the other unions national in scope and admitting to membership operating employees, without thereby putting himself out of compliance with the membership requirements of a valid union shop agreement. This is expressly provided in the last proviso to Section 2, Eleventh (c). This Court in *Felter* v. *Southern Pacific Co.*, 359 U. S. 326, 336-337 (1959) relied upon this proviso as establishing "the area that the Act leaves open for solicitation by rival organizations" and provides "the area where even a worker under a union-shop arrangement can change affiliations, see *Pennsylvania R. Co.* v. *Rychlik*, 352 U. S. 480, 492-494."

In the *Felter* case, this Court (359 U. S. at p. 337) held the Congressional policy permitted "Organizational efforts * * * attended by persuading the recruit to drop his membership in his present union (which in the *Felter* case was the Trainmen's Union holding the union shop contract applicable to the craft within which Felter was employed (359 U. S. at p. 336) and terminate any check-off of his wages in its favor." This Court therefore held illegal and violative of the Railway Labor Act a contractual arrangement between the Trainmen's Union and the Southern Pacific which required the use of a prescribed form supplied to all employees, if the employee wished to revoke his check-off, stating (359 U. S. at 337-338): "There may well be a difference in the weight of persuasion necessary to enlist the worker if he cannot at once effectuate his intentions through papers furnished him on the spot by the recruiting organization. We do not say whether the 'cooling off' period which the procedure insisted upon here creates would be wise or unwise as a matter of policy. It is enough to say that we believe the Act has not left any place for it."

The line of reasoning followed by this Court in the *Felter*

case makes it completely unreasonable to read into Section 2, Eleventh (c) other limitations narrowing the membership permitted by Section 2, Eleventh (c). The union shop agreement between the defendant Trainmen's Union and the railway violate the express language of Section 2 Eleventh (c) by not permitting membership in another union national in scope and admitting yard service employees to satisfy the membership requirement. The Trainmen's Union and the railway by refusing to allow membership in another union national in scope and admitting operating employees to satisfy the membership requirement of their contract have violated the Railway Labor Act.

The Petitioner's Brief in this case in this Court does not mention the *Felter* case. However, the Brief of Brotherhood of Locomotive Engineers as *amicus curiae,* pp. 5-6, asserts that the Second Circuit was in error when it stated that "the Supreme Court's decision in *Felter* v. *Southern Pacific Co.,* 359 U. S. 326 (1959) implies that an employee can satisfy the union shop requirement by membership in any of the recognized railroad unions for the First Division, since the Court assumed that Felter had validly changed his union membership although it was clear that he left the union which was his bargaining agent" (R. 18a). The Engineers as *amicus curiae* assert that Felter was employed as a conductor, was represented by the Order of Railway Conductors and hence was really leaving a union which was not his representative to join the union which was his representative (Br. BLE, p. 5). Admittedly *amicus curiae* does not find these facts in either this Court's opinion in the *Felter* case or the record in that case. Rather *amicus curiae* have consulted the Annual Reports of the National Mediation Board to learn that in 1956 the Order of Railway Conductors and Brakemen was the representative of conductors on the Southern

Pacific (Br. BLE, p. 6, n. 1). Whatever the true state of Felter's employment may have been, this Court recited in its opinion that Felter was "represented" by the Trainmen "in the negotiation of the bargaining agreement" (359 U. S. at p. 336) and decided the case on that basis. Moreover the Trainmen would have been powerless to make any check-off agreement applicable to Felter unless the Trainmen was the exclusive bargaining representative for the craft in which Felter was employed. Minority unions have no power to enter into any check-off arrangements. *Switchmen's Union* v. *Southern Pacific Co.*, 253 F. 2d 81, 84-85 (9th Cir. 1958), certiorari denied, 358 U. S. 818 (1958).

Accordingly we submit that this Court in the *Felter* case accepted the literal language of Section 2, Eleventh (c) and construed that section as permitting membership in any one of the operating unions to satisfy membership requirements in a union security agreement entered into by any other operating union.

B. Congress Rejected Proposals to Permit Unions Representing Operating Employees to Make Union Shop Agreements Requiring Membership in the Contracting Union and Instead Made Such Agreements Legal Only When They Permitted Membership in Any Standard Operating Union to Satisfy the Membership Requirement.

The legislative history of Section 2, Eleventh (c) compels the conclusion that a literal application of its terms was intended. The literal language conforms in every respect to the solution devised by the railway labor organizations for the particular relationship which existed between the standard railway labor organizations which represented operating employees.

The 1934 amendments to the Railway Labor Act which prohibited all forms of union shop agreements in the railroad industry had been agreed to by railway labor as a means of getting rid of company unions. George M. Harrison, appearing as spokesman for the Railway Labor Executives Association, before the congressional committees which considered the union shop amendment in 1950, reviewed the history of union shops on the railroads as follows.[2]

> "On many roads company unions operated under closed shop conditions requiring membership in a 'system association' or employee representation plan as a condition of employment * * *
>
> "It was this carrier influence over self-organization, that was the principal target of the 1934 amendments. * * *
>
> "In the then existing atmosphere, we were forced to agree to some statutory prohibition against the continuation of the type of union shop which already existed under the coercive control of company unions by management. We were not in a position to bargain for the union shop at that time, but even then we tried to restrict the statutory prohibition against requiring an employee to join a union to 'company unions' ".

Testifying before the Senate Committee Mr. Harrison stated:[3]

> "* * * when the Railway Labor Act was amended in 1934 the prohibition now appearing in the law was put in. We opposed the prohibition at that time. I happened to represent all the unions at that time before the Senate and House committees. We tried to keep it out of the bill but we did not succeed."

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2. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2d Sess., on H. R. 7789 (May 9, 1950), p. 8.

3. Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2d Sess., on S. 3295 (May 1, 1950), p. 7.

Senate bill 3295, 81st Cong., 2d Sess., and its companion bill in the House, H. R. 7789, 81st Cong., 2d Sess., as originally introduced in Congress permitted labor organizations and carriers to enter into the usual type of union shop agreements, that is, one which required all employees within the craft or class to join the contracting labor organization. It contained only the one limitation that the contracting labor organization must not deny any employee membership or expel him because of membership in any other labor organization. This appeared in the last clause of the proviso to subparagraph (a) of Paragraph Eleventh which was to be added to Section 2 of the Railway Labor Act, S. 3295, 81st Cong., 2d Sess., First Senate print. There was no difference, in the bill as originally drafted and introduced, between the type of union shop agreements which was applicable to operating employees and that applicable to non-operating employees. This bill was sponsored by the Railway Labor Executives Association which at that time had as affiliates 21 standard railway labor organizations. Three of the standard operating unions, namely, the Switchmen's Union, the Order of Railway Conductors, and the Brotherhood of Locomotive Firemen and Enginemen, were included among the 21 affiliates.[4] The Trainmen's Union and the Brotherhood of Locomotive Engineers were not at that time affiliates.

George M. Harrison, as the representative of the Railway Labor Executives' Association, appearing before both the Senate and House Committees considering this bill, testified that the reason for the provision forbidding any labor organization to require membership of any employee as a condition of employment unless it permitted that employee also to belong to any other labor organization was to conform to the existing practice of employees in the operating crafts of retaining membership in the labor organi-

4. *Ibid.*, p. 2.

zation representing the craft or class in which they had been largely employed even after promotions for longer or shorter periods to a higher craft or class or demotions for longer or shorter periods to a lower craft or class. He testified (Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2d Sess. on S. 3295, pp. 18-19):

> "The phrase on lines 14 and 15 on page 2 of the bill may require some explanation. I refer to the clause 'because of membership in any other labor organization.'
>
> "The collective-bargaining units for which provision is made in the Railway Labor Act are designated as crafts or classes. These crafts or classes, with the exception of occasional fringe employees, have a well understood and generally recognized scope. They are for the most part uniform as to scope on every carrier subject to the Railway Labor Act. Unlike most collective-bargaining representatives in outside industry, there are those in the railroad industry which recognize and protect the rights of employees who, because of the nature of their work, move back and forth across craft or class lines, and consequently move from the rules and working conditions of one collective-bargaining agreement to another. Good examples are those employees in the firemen's craft or class and those in the engineers' craft or class. The ordinary line of promotion for a fireman is to the position of engineer, and in a reduction of forces the engineer returns to a fireman's position. These two crafts or classes usually are represented by different organizations. Conceivably, either the firemen's or engineers' organizations, or any other organization concerned with the movement of employees back and forth from one craft or class to another, could deny membership to employees who are members of another labor organization, and under a union-shop agreement endeavor to compel a carrier to discharge an employee whom the union would not accept because of his membership in another union.
>
> "While we believe the preceding phrase would pro-

> hibit an agreement of that kind, it was deemed advisable to make this restriction absolutely clear so that employment could not be denied because a union refused to accept an employee into membership because he belonged to another union. That is the purpose of the phrase on lines 14 and 15 of page 2."

His testimony before the House Committee in this respect was almost identical. Hearings before the Committee on Interstate and Foreign Commerce, House, 81st Cong., 2d Sess. on H. R. 7789, p. 13.

The ebb and flow between trainmen, baggagemen and conductors and between yard service and road service is similar to the ebb and flow between firemen and engineers which is the illustration which Mr. Harrison used in his above quoted testimony. Harry See, appearing before both the Senate and House Committees as the representative of the Trainmen's Union, testified to the ebb and flow between road and yard service as follows (Hearings before Senate Committee, *op. cit.*, p. 68; Hearings before House Committee, *op. cit.*, p. 31):

> "This shuttling back and forth of employees from one craft to another is by no means limited to road brakemen and road conductors. On some carrier properties road and yard rights may be jointly held by the same individuals. There the shuttling back and forth among these crafts, namely the crafts of yardmen, road brakemen and road conductors, will be clearly demonstrated."

The Trainmen's Union traditionally represents road service while the Switchmen's Union represents yard service. The same employee may hold seniority in both road and yard service and exercise one or the other right depending on the level of employment.[5] Mr. Harrison could have

5. See Report of President's Railroad Commission established by Executive Order No. 10891, issued February 28, 1962, p. 324, "The joint seniority system, under which an employee may hold rights to work in either road or yard service (but not both during

used this illustration of ebb and flow equally as well as the illustration between fireman and engineer which he did use.

The bill as introduced in the Senate and the House was opposed by all the operating unions as it would have upset the practice of employees in the operating crafts to permit members of any one of the operating crafts to continue to belong to that union even when working under the contract of another operating union. The railroads who opposed the bill because of their opposition to the union shop, also mentioned that the bill as introduced would have this effect. Thus Daniel P. Loomis, Chairman of the Association of Western Railways, appearing on behalf of the Association of American Railroads, testified (Hearings before House Committee, *op. cit.*, p. 72):

> "You have a situation on representation that, on some properties and in some crafts is very close. For example, one of the railroads * * * according to the records of the last election held, they would indicate that about 55 percent of the yardmen on that railroad belonged to the switchmen's union and the other 45 percent belonged to the Brotherhood of Railroad Trainmen. That contract happens to have changed hands I think twice in recent years.
>
> "With a union shop, I take it that the 45 percent that belonged to the Brotherhood of Railroad Trainmen, and who hope to reestablish the majority that they held 3 or 4 years ago, would all be required to join the switchmen's union and be subject to the discipline of the switchmen's union organization."

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the same tour of duty) is in effect on a number of railroads. Many thousands of employees hold these rights." The National Mediation Board has often had occasion to note such dual seniority rights when it ruled that whether such an employee should vote in the yard craft or the road craft should be determined on the basis of which one he spent the preponderant amount of his time in during the year preceding the election. See for example, *Pittburgh & Lake Erie R. R. Co.*, 1 NMB 115, 124 (1938); *Akron, Canton & Youngstown Railway*, 1 NMB 126, 127-129 (1938).

We have set out in Appendix A at the end of this brief a list of all the instances in which from the enactment of the 1934 Amendments to the Railway Labor Act until the 1951 union shop amendment, a minority enclave became so large as to be able to take over the contract for a craft which it traditionally did not represent. For instance, in 1934 and 1935 the Brotherhood of Locomotive Engineers held the representation rights of firemen on five roads and in no instance did the Brotherhood of Locomotive Firemen hold bargaining rights for engineers. These were years of low employment and hence so many engineers were working as firemen as to constitute a majority of the firemen. Then in World War II years with employment greatly increased we find the Brotherhood of Locomotive Firemen each year taking representation rights for engineers on more railroads so that by 1946-1947 the firemen held the bargaining rights for engineers on 17 railroads and the engineers did not hold bargaining rights for firemen on a single railroad. The table lists the holding of non-traditional crafts in 544 instances on 64 different railroads.

While some of the changes may have been due in whole or part to a recruiting drive, the correlation economic conditions and the shifts from higher crafts to lower crafts and vice versa as reflected by the Engineers or Conductors holding firemen or brakemen's contracts in times of low employment and the Firemen or Trainmen holding engineers or conductors contracts in times of high employment, shows that the changes were primarily the result of an ebb and flow between crafts rather than to recruiting drives. It was this shifting because of ebb and flow which had given rise to the traditional tolerance by operating unions of substantial enclaves of minority union members.

A study of this table shows the economic motivation for the opposition of the operating unions to the bills as originally introduced and makes clear that the literal

language of Section 2, Eleventh (c) was precisely tailored to meet the needs of the operating employees.

Three different solutions for the problem of interrelationships between operating craft unions were proposed prior to the final solution embodied in Section 2, Eleventh (c) as enacted. The first was that of protecting employees from denial of membership in the contracting union because of membership in another union, which appeared in both the House and Senate bills as introducted. See testimony of George Harrison last quoted above.

The second solution was that proposed by Harry See, appearing as the legislative representative of the defendant Trainmen's Union who proposed an amendment which reads as follows: (Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess. on S. 3295, pp. 68-69; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess. on H. R. 7789, pp. 32-33):

> "provided that when two or more crafts or classes closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is the duly designated or recognized craft or class representative of any one of them."

Mr. See's proposed amendment, while it went a long way towards meeting the problem presented, did not fully solve it. In most instances the labor organizations not party to the union shop agreement, in which the employee desired to retain membership, would be the duly designated or recognized craft or class representative of the craft or class in which the employee had previously been employed. Mr.

See's proposed amendment would fully cover this situation. But it had also always been the custom in the industry for each of the five existing operating labor organizations to respect membership in any one of them even when the employee in question had not during his last previous employment in another craft or class been employed in a craft or class represented by that organization. This respect included not only tolerance of membership in the other brotherhood but also abstention from pressure to join the contracting union. For instance, sometimes so many engineers are demoted to firing that the B. L. E. represents a majority of those in the craft or class of firemen and becomes the duly designated representative of the craft or class of firemen. In such situations it is traditional that many of the firemen, continue to be members of the Brotherhood of Locomotive Firemen and Enginemen and never to join the Brotherhood of Locomotive Engineers. But Mr. See's amendment would have excluded them from its protection and if the union shop amendment had been adopted in the form suggested by Mr. See these firemen would be required to join the B. L. E. The reverse situation also occurs. And there are other logical variants of these situations as is readily apparent.

This proposal of the defendant Trainmen's Union was rejected because it was not deemed desirable to disrupt the prevalent practice on the railroads, existing only around the operating crafts, for substantial groups of employees to hold membership in either the Brotherhood of Locomotive Engineers or the Brotherhood of Locomotive Firemen and Enginemen, on railroads where the other of these two organizations held the labor contracts; for substantial groups of employees to hold membership in either the Order of Railroad Conductors or the Brotherhood of Railroad Trainmen, on railroads where the other of these two organizations held the contract; and for a

substantial minority of yard service employees to hold membership in the Switchmen's Union when the Trainmen held the contract or to hold membership in the Trainmen's Brotherhood when the Switchmen held the contract.

Especially in situations where a union holds contracts for two crafts is it usual for a large minority to persist in its membership in the other union. Thus on some railroads the Locomotive Engineers is the certified representative of both the engineers craft and the firemen craft. On these railroads regularly there exists a substantial minority of both engineers and firemen who belong to the Brotherhood of Locomotive Firemen and Enginemen. Indeed when employment has been very low, the engineers may be the majority representative of both crafts. When employment is high, the Brotherhood of Locomotive Firemen and Enginemen may be the duly certified representatives of both crafts and hold contracts for both the engineers and the firemen's craft, with a substantial minority retaining membership in the Engineers. Usually engineers have rights to serve either as an engineer or fireman but many firemen may serve substantial lengths of time before they acquire any right to serve as an engineer. On some roads traditionally the Engineers have over the years represented both crafts; on others the Firemen have over the years continuously represented both crafts. In all instances there are a substantial minority in the other union.

A somewhat similar situation exists with respect to the Switchmen, Conductors and Trainmen.

The annual reports of the National Mediation Board to Congress, Reports One through Sixteen, covering the period of 1934 to 1950, which we have collated in Appendix A at the end of this brief show that there were a total of 544 instances during this period, involving 64 railroads, in which the minority enclave had become a majority and had taken over the contract traditionally held by another union.

Thus, this table shows that in 1935 the Brotherhood of Locomotive Engineers held both the engineers and the firemen's contract on five railroads. Employment was low during this period and so many engineers had been demoted that the engineers were the majority of the firemen's craft as well as of the engineers' craft.

In subsequent years, when employment increased greatly due to the Second World War, the Brotherhood of Locomotive Firemen took over the contracts on both the engineers craft and firemen's craft on 15 railroads by 1944, and 17 by 1946, 16 of which it still held in 1950 when the union shop amendments were before Congress. If the Trainmen's proposal set forth by Mr. See had been adopted the Firemen could have wiped out all membership of Engineers on these 16 railroads. Both during the hearings and on the floor of Congress the Brotherhood of Locomotive Engineers made plain its complete opposition to the bill. Hearings in Senate, *Op. cit.*, pp. 77-87; Hearings in House, *Op. cit.*, pp. 192-194; 96 Cong. Rec. 16320-2, 16329-16330, 17052, 17059.

The Senate and House committees each reported its respective bill without the Trainmen's proposal. (Senate Report No. 2262, on S. 3295, 81st Cong., 2nd Sess.; House Report No. 2811, on H. R. 7789, 81st Cong., 2nd Sess.). However, before the bills came before either the Senate or the House for consideration, members of these committees met with representatives of the Railway Labor Executives' Association and the American Federation of Labor and agreed that when the reported bills were presented to Congress, the respective Senate and House Committees would unanimously report an amendment reading as follows (96 Cong. Rec. 15735, col. 3, Senate on September 23, 1950; 96 Cong. Rec. 17052, col. 2, House on January 1, 1951):

> "*Provided further*, that no such agreement shall require membership in more than one labor organization;"

The Switchmen's Union, as well as the Brotherhood of Locomotive Firemen and Enginemen and the Order of Railway Conductors, were at that time members of the Railway Labor Executives' Association, which agreed to this amendment on behalf of their constituent unions. The Trainmen's Union was not a member of this organization at that time (Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess., on S. 3295, May 1, 1950, p. 7), and did not support this amendment (96 Cong. Rec. 15738, col. 2).

Senator Hill was in charge of the bill in the Senate and Congressman Harris was in charge of the bill in the House. When S. 3295 came before the Senate for consideration on September 23, 1950, Senator Hill stated (96 Cong. Rec. 15735, col. 2):

> "Mr. President, the bill was unanimously reported by the Senate Committee on Labor and Public Welfare, but there were three members of the committee, the Senator from Ohio [Mr. Taft], the Senator from Missouri [Mr. Donnell], and the Senator from New Jersey [Mr. Smith], who felt that there were several questions raised by the bill which were not adequately taken care of as they should be. These three members reserved the right to offer such amendments as they thought might be fitting and might take care of the questions raised.
>
> "Since the report of the bill by unanimous action of the committee, these amendments have been worked out, they have been agreed upon, and on behalf of the senior Senator from Ohio [Mr. Taft] and myself, I have offered the amendments. I should like at this time to have the amendments reported so that in my discussion I may discuss the bill with the amendments."

The legislative clerk then read the amendment (96 Cong. Rec. 15735, col. 3):

> "On page 2, * * * line 21, to strike out the comma, sub-

stitute a colon, and the following: *'Provided further,* that no such agreement shall require membership in more than one labor organization';"

Senator Hill then explained this amendment as follows (96 Cong. Rec. 15736, col. 3):

> "An employee could belong to as many different unions as he wished to belong to. But he cannot be required to belong to one. If he belongs to one, he meets the provisions of the statute, and he cannot be required to pay dues to or to belong to more than one union."

Senator Hill then proceeded to explain that (96 Cong. Rec. 15738, col. 2):

> "There are four railway labor organizations which are not now supporting the bill."

These four organizations were the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and the Brotherhood of Railroad Trainmen. The Switchmen's Union, as represented by the Railway Labor Executives Association, was supporting this bill as so amended.

Consideration of the bill was postponed until December 6, 1950. When the bill came before the Senate on December 6, 1950, consideration was delayed another 24 hours to give the unions who were opposing the bill an opportunity to agree upon an amendment (96 Cong. Rec. 16189, col. 3). By the end of December 6, 1950, three of the four opposing unions had come to agreement with the Railway Labor Executives Association and representatives of the Congressional committees on the language which now appears in the statute as Section 2, Eleventh (c) (96 Cong. Rec. 16261, 16330).

On December 7, 1950, Senators Taft and Hill offered the agreed upon amendment, stating that it was drafted by the Brotherhood of Locomotive Firemen and Enginemen, the

Order of Railway Conductors and the Brotherhood of Railroad Trainmen and it was adopted by the Senate that same day (96 Cong. Rec. 16268, col. 2). On December 11, 1950, the Senate passed S. 3295, as so amended (96 Cong. Rec. 16378). By letter dated the following day, December 12, 1950, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and the Brotherhood of Locomotive Firemen and Enginemen wrote the chairman of the House Rules Committee that the amendment adopted by the Senate made S. 3295, as passed by the Senate, acceptable to them.

On January 1, 1951, the House by a roll call vote agreed to consider S. 3295, in place of the substantially similar H. R. 7789, which was in the House Calendar for that day (96 Cong. Rec. 17046, col. 3—17047, col. 3).

Congressman O'Hara of Minnesota inserted in the Congressional Record a statement on behalf of the Brotherhood of Locomotive Engineers opposing adoption of either H. R. 7789, as reported or S. 3295, as passed by the Senate. This statement, in material part, read as follows (96 Cong. Rec. 17052, col. 2):

> "Three amendments to bill H. R. 7789 were given favorable consideration by the House Committee on Interstate and Foreign Commerce, subsequent to August 7, 1950 when the bill was reported out of committee with House Report 2811.
>
> "* * * the second amendment proposing: *Provided further,* that no such agreement shall require membership in more than one labor organization, appears to merit considerable attention and there must be some controversy as to whether an employee, as a young man, was in service as a waiter in a railroad restaurant and joined the union of such employees, might assume that his union card in the waiters' union should qualify him for rights in the other 127 different crafts and/or divisions of crafts identified by the Interstate Com-

merce Commission as being railroad employees, if those other crafts had contracts with the different railroads under the authority of this legislation."

Congressman Harris served as the spokesman for the House Committee on Interstate and Foreign Commerce, in guiding this legislation through the House. On January 1, 1951, immediately preceding the adoption on that same day by the House of the Senate bill, as amended by the Senate, Congressman Harris explained the history and purpose of Section 2, Eleventh (c) to Congress as follows (96 Cong. Rec. 17059, cols. 2-3):

"The similar House bill, H. R. 7789, was a subject of lengthy hearings by our committee during May and June of 1950. During the course of the hearings differences of opinion developed * * * among labor organizations themselves, particularly those in operating services over the possible requirement that certain employees be required to maintain membership in more than one union.

"We in the committee attempted to determine and resolve these differences * * *

"It was not entirely satisfactory, therefore, subsequently certain further questions arose over the definiteness of the protection afforded operating employees against being compelled to belong to more than one union * * *

"As the bill was reported * * * the operating brotherhoods opposed it. On September 11, 1950, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen, directed a letter to Senator Lucas opposing the bill S. 3295, before the Senate in its present form.

"The following day, September 12, 1950, a letter directed to the members of the Rules Committee of the House signed by representatives of all four of the operating brotherhoods, the Locomotive Engineers, the Firemen and Enginemen, the Brotherhood of Railway Conductors, and the Brotherhood of Railroad

Trainmen, opposing H. R. 7789, which had been reported by our committee and stating that the proposed amendments in their opinion 'make the bill more unsatisfactory'. They, therefore, requested the Rules Committee to decline a rule on the proposal.

"In December, these * * * differences * * * were matters of amendment on the Senate floor during the consideration of the bill by that body. Clarification of the amendments was made. There were adjustments and the bill in the amended form as it comes to us now from the Senate appears to be endorsed and actually urged by 21 of the 22 national railroad labor organizations.

"On December 11, three of the four operating brotherhoods, the Firemen and Engineers, Order of Railway Conductors and the Trainmen, wrote a letter to the chairman of the House committee, to the effect that they had been opposed to railway union shop bills, S. 3295 and H. R. 7739, but the Senate had just passed S. 3295, and incorporated therein a measure which makes the proposal entirely satisfactory. Having cleared up these * * * issues, they urged that the Senate bill, 3295, which we have before us today, be passed."

Congressman Harris explained Section 2, Eleventh (c) as follows (96 Cong. Rec. 17059, col. 3):

"I have stated the purposes of this proposed amendment. Now the two principal changes in this Senate-passed bill from the House bill as reported by the committee are:

"* * * the addition of *subparagraph (c)* which *leaves the individual employee in the operating services the choice of operating union to which he will belong*, and this specifically resolves any doubt concerning a possible requirement of dual membership. However, if any employee is not a member of any union at the time of union shop agreement, if any, he must join the craft of the bargaining agent, within the 60 days in which he is working at the time." (Emphasis supplied.).

The House proceeded immediately thereafter — three pages later in the Congressional Record—to adopt this bill (96 Cong. Rec. 17062).

That the Senate likewise understood this was the meaning of Section 2, Eleventh (c) see the statement of Senator Holland describing the amendment which became the present Section 2, Eleventh (c) as (96 Cong. Rec. 16322, col. 1):

> "an amendment of a type which would make membership in one union among the operating brotherhoods sufficient."

Numerous Congressmen explained the bill as directed only at employees who do not belong "to one of the brotherhoods" (Congressman O'Hara, 96 Cong. Rec. 17052), "who are not now in one of the unions" (Congressman Harris, 96 Cong. Rec. 17060) and "who are not members of any union" (Congressman Wolverton, 96 Cong. Rec. 17050).

There has grown up in Congress over the years a practice of allowing railroad unions, either by themselves, or in conjunction with the railroads, to draft the language of statutes applicable to railway labor. See Hearings before the Committee on Interstate and Foreign Commerce, House, 69th Cong., 1st Sess., on H. R. 7180, pp. 9, 11 (Railway Labor Act of 1926); Hearings before House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H. R. 6956, pp. 12-13 (Railroad Retirement Act of 1937); [84 Cong. Rec. 6631]; Hearings before Committee on Interstate and Foreign Commerce, House, on H. R. 9706, 76th Cong., 3rd Sess. pp. 15, 22, 24, 26, 86, 87, 143; 86 Cong. Rec. 5522, 9645, 12877; 97 Cong. Rec. 13642 (Amendments to Railroad Unemployment Insurance Act).

Where the language of the statutory provision, as here, is drafted by the railway labor unions themselves, within a matter of days before their language is submitted

to and adopted in Congress, and without any hearings subsequent to the formulation which became the law, the language itself is more compelling than any Congressional statements.

C. For the First Fifteen Years Following Its Enactment, Section 2, Eleventh (c) of the Railway Labor Act Was Uniformly Construed and Applied by the Brotherhood of Railroad Trainmen, by the Erie Lackawanna Railroad, by All the Other Railroads and Operating Unions, All Administrative Agencies and All Courts to Permit Membership in Any Standard Operating Union to Satisfy Union Shop Requirements.

This Court has uniformly refused to overturn a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *United States* v. *American Trucking Assn's.*, 310 U. S. 534, 549, quoting from *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. To the same effect see *Labor Board* v. *Driver's Local Union*, 362 U. S. 274, 290; *United States* v. *Chi., N. S. & Mil. R. Co.*, 288 U. S. 1, 13-14; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 25, 26; *United States* v. *South Buffalo Ry. Co.*, 333 U. S. 771, 774-775; *United States* v. *Ryan*, 284 U. S. 167, 174-175. This principle is even more applicable where as here the statute was drafted in pertinent part by those who later construed and applied it, as here.

From 1952 until the present contract of February 1, 1967, for a period of fifteen years all the union shop contracts executed by the Trainmen's Union and by all the other standard operating unions contained the exact language of Section 2, Eleventh (c) written out in full in the

contract as an exception to the requirement of membership in the contracting union and all of these contracts were uniformly applied by carriers, unions, adjustment boards, arbitrators and courts to permit membership in any of the five operating unions who have members on the First Division of the National Railroad Adjustment Board as satisfying the requirement of membership in the contracting union. David Levinson, Union Shop Under the Railway Labor Act, 6 Lab. Law Journ. 441, 444 (July 1955).

Indeed it was not until almost ten years after the decision in *Rychlik* (352 U. S. 480) that the Brotherhood of Railroad Trainmen suddenly discovered in that decision the meaning it now attributes to it.

Not until 1967 did the Brotherhood of Railroad Trainmen begin entering into contracts which do not expressly write in the language of Section 2, Eleventh (c). All of the contracts which are collected in Brotherhood of Railroad Trainmen's exhibits in this case as illustrative of other contracts of a similar nature to which it is a party are dated in 1967 (R. 95a-120a). Prior to 1967, we have not been able to find a single instance in which any standard operating union ever construed its union shop contract as not permitting membership in the other standard operating unions to satisfy the membership requirement.

Indeed, the second sentence of the opinion in *Rychlik*, 352 U. S. at pp. 481-482, recites this alternate membership as one which accords with the requirements of the statute. This Court stated (352 U. S. at pp. 481-482):

> "In accordance with Section 2, Eleventh (a) and (c) of the Railway Labor Act, the Brotherhood and the Railroad negotiated a union shop contract in 1952, which required trainmen employed by the Railroad to become members of and retain membership in the Brotherhood or in another labor organization 'national in scope' and 'organized in accordance with the Railway Labor Act'."

The union shop agreement involved in *Rychlik* is printed at record pages 7-13 of the record in the Supreme Court in *Rychlik,* No. 56, O. T. 1956. At p. 13 of the record appears as one of the exceptions to membership the language of Section 2, Eleventh (c) copied into the contract.

Neither the Brotherhood of Railroad Trainmen nor any other party in *Rychlik* argued to this Court that Rychlik's membership in UROC was insufficient because UROC held no contracts or because Rychlik did not have interchangeable rights between crafts. No one thought this a defense. The only argument was that membership in UROC did not meet the literal language of Section 2, Eleventh (c) because the term "national in scope" was a term of art having the same meaning as Congress gave to that term in Section 3, First (a) of the Railway Labor Act specifying this as a requirement for selection of members of the National Railroad Adjustment Board.

In its brief to this Court in the *Rychlik* case, contrary to the position taken in its brief here, the Brotherhood of Railroad Trainmen recognized that membership in any of the organizations national in scope assured that dues paid to any one of the organizations would contribute equally to costs of the collective bargaining machinery. Before quoting this portion of the Trainmen's brief in this Court in the *Rychlik* case, we should explain that at all times from the enactment in 1934 of the amendment to the Railway Labor Act providing for the National Railroad Adjustment Board to date the First Division has had five members, one from the Switchmen's Union, one from the Order of Railway Conductors, one from the Brotherhood of Railroad Trainmen and the other two respectively from the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen. Each union pays the expenses of its own members. The five labor members always vote as a bloc. Hence each the Switchmen's Union

and the Order of Railway Conductors pays exactly the same amount as the Brotherhood of Railroad Trainmen towards maintaining the members of the National Railroad Adjustment Board. As we shall show hereinafter, there are numerous other respects in which all five operating unions share equally in negotiating and policing collective bargaining agreements for all five unions on a joint basis. It was this recognition that led to the following statement in "Brief for Petitioner Brotherhood of Railroad Trainmen," *Pennsylvania R. R. Co.* v. *Rychlik,* No. 56, O. T. 1956, p. 30:

> "'If the union fails to seek qualification through Section 3, First (f) procedure it will thereby warn all employees in advance of the grave risk they take in joining a union that lacks elector status. See Note, 69 Harv. L. Rev. 1512 (1956). But the individual does not hereby lose any rights under the statute. He is merely put on notice that membership in such a union will not constitute compliance with the union shop requirement.
>
> "One result of imposing upon the union the obligation of utilizing the procedure of Section 3, First (f) if it desires 'national in scope' status is to remove the possibility of a non-national union enjoying status under the Act without assuming 'its fair share of the burdens and responsibilities attendant upon the administration of the Act.' *Pigott* v. *Detroit T. & I R. Co.,* 116 F. Supp. 949, 955 (E. D. Mich. aff'd, 221 F. 2d 736 (C. A. 6).) Most of the financial cost of enforcing the Act and maintaining its administrative processes is borne by the qualified unions. That cost is reflected in the dues of each qualified union. Unless a union were obligated to participate in the Adjustment Board machinery before qualifying under the union shop requirement, it might acquire an unfair advantage over the qualified unions by way of reduced dues."

The foregoing interpretation of the provisions of Section 2, Eleventh (c), as satisfying the requirement for

financial support of the collective bargaining machinery by membership in any of the unions having members on the First Division of the National Railroad Adjustment Board, allowed membership in any of the other four to satisfy the membership requirements of the contracting union's union shop contracts.

For other cases involving the Brotherhood of Railroad Trainmen where the court opinion mentions that its union shop contract permits alternate membership in any of the other unions national in scope, see *Pigott* v. *Detroit, Toledo and Ironton R. Co.*, 221 F. 2d 736, 739 (6th Cir. 1955), certiorari denied, 350 U. S. 833, where the court said:

> "Accordingly, as required by the statute, the union shop agreement also excepted from the necessity of joining the Brotherhood all those employees who belonged to another labor organization 'national in scope' and 'organized in accordance with the act'."

See also: *Alabaugh* v. *B & O R. Co.*, 125 F. Supp. 401, 407 (D. Md.), aff'd, 222 F. 2d 861 (4th Cir. 1955), cert. den., 350 U. S. 839; *B. L. F. & E.* v. *Northern Pac. Ry. Co.*, 279 F. 2d 641, 645 (8th Cir. 1960); *UROC* v. *Northern Pacific R. Co.*, 208 F. 2d 135 (9th Cir.) cert. den., 347 U. S. 929; *UROC* v. *Wyer*, 115 F. Supp. 359 (S. D. N. Y., 1953), aff'd, 205 F. 2d 153 (2d Cir. 1954), cert. den., 347 U. S. 929; *Bohnen* v. *B & O R. Co.*, 125 F. Supp. 463 (N. D. Ind.).

Prior to the decision of Judge Herlands in this case, there were no reported cases so far as we know involving the right of any member of a standard operating union to meet union shop requirements of any other operating union by maintaining membership in his own union. The reason is that all five unions have heretofore uniformly interpreted and applied the statute in this manner. Indeed, the Trainmen's union admits that the Union Shop agreement between the Trainmen and the Erie in effect prior to

March 14, 1967, permitted membership in the Switchmen's Union or the Conductors to satisfy the requirement of membership for union shop purposes. Neither *Rychlik* nor *Rohrer* v. *Conemaugh & Black Lick R. R. Co.*, 359 F. 2d 127 (3rd Cir.), involved a union shop agreement with a standard operating union which was being used to require a member of another standard operating union to change his membership in order to hold his job. Indeed in *Rohrer,* the Trainmen argued for the construction which the Switchmen and Conductors urge in the instant case.

Subsequent to the decision of Judge Herlands we have had decisions in *Dirks* v. *Birkholz,* No. 172, this Term, by the Seventh Circuit, and in *Carter* v. *Richmond, Fredericksburg, and Potomac Railroad Company,* No. 4398, by the District Court for the Eastern District of Virginia, decided September 12, 1968, holding union shop agreements similar to the one here involved, invalid.

This uniform construction of Section 2, Eleventh (c) by the unions which themselves drafted its language and presented it to Congress should carry considerable weight. As the Seventh Circuit stated in *Birkholz* v. *Dirks,* 391 F. 2d 289, 293, pending here on certiorari, No. 172, this Term:

> "The Trainmen's position would suggest that the drafters of 2 Eleventh (c), including itself, did not know what the Section meant and have been misapplying it for fifteen years."

The Second Circuit in the instant case cited the decision of the Seventh Circuit in the *Birkholz* case with approval (R. 9a). And Judge Palmieri, in his opinion granting summary judgment for the plaintiffs in the instant case in the district court referred to the uniform practice of the Trainmen and all other operating unions from 1951 to 1967 (R. 27a).

D. Membership in the Switchmen's Union or Conductors' Union Contributes to the Financial Support of the Collective Bargaining Apparatus Applicable to Operating Employees Equally as Much as Membership in the Trainmen's Union.

The Trainmen (Br., pp. 8-9) argue that membership in the Switchmen's Union or Conductors' Union fails to meet the purposes of Congress in enacting the union shop amendment to the Railway Labor Act because money paid to the Switchmen or Conductors' Union does not support collective bargaining for employees represented by the Trainmen. This is not true. As the Brotherhood of Railway Trainmen itself pointed out to the Supreme Court of the United States in its brief in the *Rychlik* case in the portion above quoted all labor organizations national in scope share in the financial support of the collective bargaining machinery applicable to operating employees. Each of the five maintains a member on the National Railroad Adjustment Board. Each contributes to the support of the Railway Labor Executives Association. All participate together in many of the major national negotiations. Congress gave statutory recognition to this pooling of resources when it made membership in any of these five unions equally a satisfaction of a union shop agreement with any one of them.

Long prior to the enactment of Section 2, Eleventh (c), the five operating unions had established a practice of conducting all their major negotiations on a joint basis. In its Fourth Annual Report, that for fiscal year ended June 30, 1938, pp. 3-4, the National Mediation Board stated:

> "* * * included among these mediation settlements were two affecting more employees and involving a larger sum total of adjustments in payroll expenses than any other case mediated since the enactment of

> the Railway Labor Act in 1926. This was due to the fact that the labor organizations concerned speaking for virtually all railroad employees on the one hand, and the railroad managements, speaking for virtually all of the Class I carriers on the other hand, had arranged to handle negotiations and subsequent proceedings on a national basis through comparatively small conference committees."

And at page 21 of the same annual report, the National Mediation Board describes one of these settlement agreements as involving "the five transportation brotherhoods, speaking for the so-called transportation employees" in negotiating wage increases and employment guarantees.

In its Sixteenth Annual Report, for fiscal year ended June 30, 1950, *which was the last year prior to the enactment* of Section 2, Eleventh (c), the National Mediation Board reported to Congress (at page 3):

> "For many years the labor organizations on the railroads, generally referred to as the non-operating groups, handled their disputes independently. In recent years they have acted concertedly in all movements involving adjustments in wages nationally, and in connection with the 40-hour week. The principal carriers have authorized regional conference committees to deal with these organizations collectively on a nationwide basis. This practice, however, has been followed for many years in connection with the so-called operating groups."

The annual reports of the National Mediation Board are filled with instances where the Switchmen's Union or Conductors' Union, the Trainmen and one or more of the other standard operating unions act jointly in negotiations, presentations to National Emergency Boards appointed by the President and to arbitrators or in other aspects of collective bargaining. *E.g.*, 4th Annual Report of N. M. B. for fiscal year ended June 30, 1938, p. 21; 10th Annual Report, pp. 35, 70; 11th Annual Report, pp. 31-32; 16th Annual Report,

pp. 4, 57, 63; 17th Annual Report, pp. 7-8; 26th Annual Report, p. 16; 27th Annual Report, p. 17; 28th Annual Report, p. 14; 29th Annual Report, pp. 14-15; 30th Annual Report, pp. 15-18. This cooperation and joint action is reflected in the reported decisions of the courts. See for example *BLE, et al.* v. *B & O*, 372 U. S. 284. For a summary of the many joint negotiations from 1934 to 1950 see Jacob J. Kaufman, Collective Bargaining in the Railroad Industry (Columbia Univ. 1954), pp. 46-50.

During the hearings which preceded the enactment of Section 2, Eleventh (a), witnesses testified with respect to the complicated machinery for bargaining which the unions supported. Thus George M. Harrison testified (Hearings before Senate Committee, *op. cit.* p. 16; compare Hearings before House Committee, *op. cit.*, p. 50):

> "* * * collective bargaining in the railroad industry is more complex. The administrative machinery is more complete and complex. The mediation, arbitration and Presidential Emergency Board provisions of the act * * * are very costly to the unions. The handling of agreement disputes through the National Railroad Adjustment Board also requires expense * * *"

The Second Circuit in its opinion below found the sharing of costs by unions an answer to the contention that a literal construction was inconsistent with the objective of eliminating the "free riders". The Second Circuit stated (R. 18a):

> "It is true * * * the purpose of the union shop is to prevent * * * 'free riders' * * *. But we cannot say the scheme adopted by Congress, which permits membership in any of the unions which jointly share the duty of administering the machinery of the National Railway Labor Act is inconsistent with that purpose."

The share of the costs of this national bargaining apparatus which each of the five operating unions bears is so

substantial as to assure that none of them can afford to take in any member for a nominal initiation fee, dues or assessments. By the time the union shop amendment was adopted each of the unions had constitutions fixing the amount of initiation fee and dues, and usually limiting the amount of assessment. George M. Harrison, testifying in opposition to any regulation of the rate of fees or dues, relied on the established character of the unions' financial structures, based on constitutions which he described as having "been in existence, some of them, for as long as 100 years." Hearings before Senate Committee, *op. cit.*, p. 33. See also Hearings before House Committee, *op. cit.*, pp. 19, 72. The unions which got together and drafted subparagraph (c) were familiar with the practices of each of the five operating unions as to dues and realized that each had obligations which prevented any substantial lowering of its dues structure.

While the Brief of the Brotherhood of Locomotive Engineers as Amicus Curiae, p. 4, scoffs at the notion that the draftsmen could have intended membership in the Switchmen's Union to satisfy an Engineer's union shop, so far as eliminating free riders, it clearly did so. If any engineer wished to join the Switchmen rather than the Engineers, he would cease to be a free rider and contribute his fair share to the expenses of bargaining.

The assumed lack of mutual interest between Switchmen and Engineers, which the brief amicus suggests is belied by the fact a Switchmen representative has an equal say with an Engineers representative in the disposition of all grievances of engineers that come to the National Railroad Adjustment Board, and that the Switchmen and the Engineers have often participated in joint bargaining in issues handled nationally. See references to the Annual Reports of the National Mediation Board last cited.

With respect to any implausibility that Congress in-

tended such alternate union membership, it must be recalled that each the Senate and the House Committee reported to Congress an amendment which would have permitted membership in any labor union to satisfy a union shop requirement (96 Cong. Rec. 15735, col. 3; 96 Cong. Rec. 17052, col. 2). If Congressional spokesmen were satisfied with membership in any union, clearly membership in one of the five cooperating operating unions was just what they intended when they substituted subparagraph (c) for their amendment permitting alternate membership in any union to satisfy any union shop agreement on the railroads.

E. The Trainmen's Construction of Section 2, Eleventh (c) of the Railway Labor Act, Reads the Last Proviso Thereof Out of the Statute.

The last proviso in Section 2, Eleventh (c) of the Railway Labor Act reads:

> "That nothing herein or in any such agreement or agreements shall prevent an employee from changing to another organization admitting to membership employees of a craft or class in any of said services."

Over the fifteen years since the enactment of the union shop amendment to the Railway Labor Act, all standard operating unions have interpreted Section 2, Eleventh (c) as allowing free change of membership from one to another of the standard operating unions without any claim that there was any violation of the union shop agreement so long as the employee held membership at all times in at least one of these unions. This conforms with the pooled concept evident in the whole of Section 2, Eleventh (c). Defendants offer no way of reconciling their interpretation with this language. The Brotherhood of Railroad Trainmen's interpretation of the statute affords no opportunity

for an employee who is a member of the contracting union ever to change his membership so long as he was employed in the same craft or class. But the statute gives him the right to change out of the contracting union even though he does not move to another craft. Only by construing the language of this section to allow alternate membership at all times, can the language of the proviso be given effect. See *Felter* v. *So. Pac. Co.*, 359 U. S. 326, 337 (1959).

F. The Trainmen Misread the Rychlik and Rohrer Cases.

The Trainmen rely upon *Pennsylvania Railroad* v. *Rychlik*, 352 U. S. 480 and *Rohrer* v. *Conemaugh & Black Lick Railroad Company*, 359 F. 2d 127 (3rd Cir.).

This Court in the *Rychlik* case did not have before it the issue here presented and made no ruling relevant to the instant case. It is true this Court referred to the ebb and flow relationship between the crafts as explaining the reason for the provisions for alternate membership which are present in the union shop amendment to the Railway Labor Act. But nowhere in this Court's decision is there any basis for concluding that the Court would distort the plain language of Section 2, Eleventh (c) to make it conform to the main reason for the provision for alternate membership. Certainly, the Court did not have before it the legislative history showing that the Trainmen proposed language to Congress strictly limited to the ebb and flow problem and that Congress rejected this language and adopted a broader form of alternative membership which conformed more fully to the prevalent practice of substantial enclaves of the minority union existing peacefully over the years in the jurisdiction represented by a majority union.

We submit that if this Court had construed the statute as the Trainmen contend, the Court would have had no need to spend pages deciding whether the term national

in scope was used in its common meaning or as a word of art having the same meaning as when used in Section 3, Third (a). This Court expressly placed its decision solely on the point of the meaning of national in scope. This Court states at the beginning of its opinion:

> "For the reasons hereafter given, we hold that Section 2, Eleventh (c) allows alternate union membership only in those unions which have already qualified under Section 3, First of the Act, as electors of the union representatives on the National Railroad Adjustment Board, and not membership in any union which happens to be, as a matter of fact, national in scope and organized in accordance with the Railway Labor Act."

The Court would not have any occasion so to rule if membership was limited to a union holding a contract. Admittedly UROC held no contract on the Pennsylvania R. R. Co. nor did any of the parties or amicus curiae ever so much as suggest that alternative membership was restricted to unions holding contracts or to employees having interchangeable craft rights. No language in the statute is susceptible of this construction. That the Court did not intend its references to the purpose of Section 2, Eleventh (c) to limit the literal language is made plain by the reference to *Rychlik* contained in *Felter* v. *So. Pac. Co.*, 359 U. S. 326, 337 (1959) where it is cited as holding Section 2, Eleventh (c) gives employees the right to change unions in the area of the five standard operating crafts. This shows *Rychlik* means just the opposite of what the Trainmen find in it.

Rohrer v. *Conemaugh & Black Lick Railroad Co.*, 359 F. 2d 127, involved an industrial unit, not a craft unit. Thus at page 128 the court recites that "the National Mediation Board had certified the Union as the bargaining representative of all the employees of the Railroad regardless of their class or craft." *Conemaugh & Black Lick Railroad*

Co. is a wholly owned and consolidated subsidiary of the Bethlehem Steel Company. All of its employees were represented by the United Steel Workers Union. It was organized and functioned as an industrial operation rather than as a railroad. The provisions of Section 2, Eleventh (c) are by their terms only applicable to situations where employees are organized and the union certified on the basis of crafts or classes limited to operating employees, namely the "engine, train, yard or hostling service." The *Rohrer* case presented a problem for which Congress obviously did not legislate when it adopted Section 2, Eleventh (c).

The first amendment presented to Congress by Senators Taft and Hill in the Senate on September 23, 1950 (96 Cong. Rec. 15735, col. 2) treated all organized labor as one pool for purposes of a union shop. It would have allowed the membership requirement in a contract with any one union to be satisfied by membership in any other union (96 Cong. Rec. 15736, col. 3). This proposal was unacceptable because evasion by forming a new cheap dues organization was too simple. A pool composed of all union members was not all inclusive, unless there was some way of limiting the pool to members of unions bona fidely engaged in the kind of expert servicing of workers which is the earmark of unions recognized as part of the established labor movement.

The solution of limiting the pool to members of organizations participating on the National Railroad Adjustment Board, was hit upon as solving this problem. The solution preserved the traditional relationship which had existed for half a century between the five railroad operating unions. There is no indication anyone considered what rules should govern if the contracting union was not itself one of the unions with membership on the National Railroad Adjustment Board. This was the problem presented by *Rohrer* v. *Conemaugh & Black Lick.* The Court there decided that the

whole pooled concept was inapplicable when the contract was not with one of the unions in the pool. Certainly, this decision offers no guidance in a case where all the unions involved are ones which Congress had specifically in mind in setting up a pooled concept of union shop.

Congress by defining the organizations whose members were to constitute a pool for purposes of Section 2, Eleventh (c), as those naming members to the Adjustment Board, created a pool composed of members of the Engineers, Firemen, Conductors, Trainmen and Switchmen's Union. The contracting union in the *Conemaugh & Black Lick* case was the Steelworkers. Its members were not part of the pool. Dues to the Steelworkers did not contribute to joint contract movements with the Trainmen. There was none of the averaging out of costs between Steelworkers and Trainmen which is present between Trainmen and Switchmen due to the fact that on roads where the Switchmen hold the contract, Trainmen members get its benefits, just as on roads where the Trainmen hold the contract, Switchmen members get its benefits.

While we believe *Rohrer* v. *Conemaugh & Black Lick* was wrongly decided, we suggest that the industrial character of the unit represented, as well as the identity of the contracting union as not one of those participating on the Adjustment Board, make that case inapplicable as a precedent here.

Both the Second Circuit in the instant case (R. 17a-18a) and the Seventh Circuit in the *Dirks* case (391 F. 2d at p. 294), as well as Judge Herlands (R. 42a-45a) in the district court in this case and Judge Oren R. Lewis in *Carter* v. *Richmond, Fredericksburg and Potomac Railroad,* No. 4398, U. S. D. C. E. D. Va., decided September 12, 1968, held *Rychlik* and *Rohrer* inapplicable to the issue here involved.

II.

THE CONSTRUCTION URGED BY THE TRAINMEN IS UNWORKABLE AS IT WOULD CREATE SUCH UNCERTAINTY OVER PERMISSIBLE ALTERNATE MEMBERSHIP AS IN EFFECT TO WIPE SUBPARAGRAPH (c) OUT OF THE STATUTE, WITH RESULTING STRIFE AND DISCONTENT.

The construction urged by the Trainmen calls for judicial legislation without any guides from Congress. Myriads of problems will arise as to what ebb and flow satisfies the criteria for permissible alternate memberships. As Judge Herlands stated in his opinion accompanying the issuance of the preliminary injunction in this case in the district court (R. 40a-41a):

> "The Brotherhood argues that Section 2, Eleventh (c) should not be construed to bar strict union shop provisions when the particular factual circumstances do not involve the problem of intercraft mobility. How—as a practical matter—would such a construction of the statute be implemented?
>
> "On each occasion that a strict union shop agreement is executed, the employees who are members of a minority union would be faced with the dilemma with which the instant plaintiffs are confronted. As here, the question of the validity of the agreement inevitably would find its way into the federal courts for an ad hoc adjudication.
>
> "But what evidence should be admitted, and what standards should the Court employ in determining the quality and magnitude of the problem of intercraft mobility in a particular situation? Is the Court to make a subjective evaluation of the relatedness of various crafts, the mobility of individual employees, the likelihood of change in the bargaining representative resulting from shifts in employment, etc.?
>
> "While the Brotherhood asserts that a possible standard could be whether the minority union is the

designated or recognized representative of any related class or craft, the legislative history indicates that this approach was explicitly suggested to the Congressional committees by the Brotherhood but not adopted by them."

Since union shop agreements present a threat of loss of jobs, employees will never enjoy the protection Congress accorded them by subparagraph (c) unless the application of that section is clear and written into all union shop agreements in equally clear fashion. Otherwise the fear of loss of jobs will compel membership in the contracting union. The only clear cut exception which will give subparagraph (c) any practical meaning, is to accept its literal language as meaning what it says. This has proved workable for fifteen years of uniform application on all railroads in the United States. To begin to make qualifications and limitations would give rise to uncertainty and unrest and would destroy the intended effect of subparagraph (c).

The conjectures in the briefs filed by the Trainmen and Engineers that strife and unrest follow from the literal interpretation is without basis in fact. There is no evidence that the literal application of subparagraph (c) during the fifteen years following its enactment created any strife or unrest. Indeed the existence of minority union enclaves without any union shop weapon to bring them into the bargaining agent's membership, had existed during the whole period since the Railway Labor Act was enacted in 1926. And even prior thereto union shop agreements had never been utilized by the standard railway labor unions. Hence it is unrealistic to argue that a strict union shop is needed to prevent strife and unrest. Rather a change now in the interpretation of subparagraph (c) would have such a result. This consequence of an adoption

of the Trainmen's position was pointed out by various of the judges who have considered the problem. The Seventh Circuit in the *Dirks* case stated (391 F. 2d at p. 293):

> "The fifteen year practice of allowing membership in any standard operating craft union to satisfy union shop agreements also militates strongly against the Trainmen's argument that the elimination of minority representation would promote peace between unions. It is difficult to see how labor peace would be promoted by abrogating what is, in effect, an agreement between the operating brotherhoods which has guided their relations for fifteen years.
>
> "We believe that the railroad unions responsible for Sec. 2 Eleventh (c) and Congress deliberately chose * * * to avoid upsetting the balance of union power between the majority union bargaining agent and substantial minority union members in the bargaining unit."

Judge Herlands stated (R. 41a-42a):

> "In any event, whatever may be the advantages or disadvantages of other approaches to the problem of intercraft mobility, the means provided by the literal terms of Section 2, Eleventh (c) accommodates the needs of the employees in the operating crafts without promoting internal warfare between unions."

CONCLUSION.

The Congressional innovation of a more expansive union shop than the traditional one deserves sympathetic treatment by this Court. The traditional union shop, if imposed on operating railroad employees, would upset union practices accepted by all five railroad operating unions for more than half a century. The union shop which Congress provided by Section 2, Eleventh (c) prevents the use of the union shop as a device to build membership in any one operating union by forcing non-consenting members of other operating railway unions into the ranks of any one union. By preserving the traditional tolerance for choice of operating union among all operating employees, Section 2, Eleventh (c) serves a worthwhile objective, which should be given full effect by affirming the judgment below.

Respectfully submitted,

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December 26, 1968.

APPENDIX A.

TABLE OF CARRIERS ON WHICH, DURING THE PERIODS INDICATED, THE NAMED RAILROAD BROTHERHOOD HELD CONTR
AND THE RELATED CRAFT IN WHICH ITS MEMBERS HOLD SENIORITY RIGHTS BUT WHICH IS TRADITIONALLY REPRESENTE

(Where BLE is listed the Brotherhood of Locomotive Engineers held the contract for both engineer's and firem
BLF&E is listed the Brotherhood of Locomotive Firemen and Enginemen held contract for both firemen's and
where ORC is listed the Order of Railway Conductors held the contract for both the conductor's and trainmen's
BRT is listed the Brotherhood of Railroad Trainmen held the contract for both the trainmen's and conductor's or

RAILROAD CARRIERS	1934–1935	1935–1936	1936–1937	1937–1938	1938–1939	1939–1940	1940–1941	1941–1942	1942–1943	1943–1944
Akron, Canton & Youngstown Ry. Co.									BRT	BRT
Atlanta, Birmingham & Coast R. R. Co.				BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
Atlanta & West Point R. R. Co.	BLE	BLE	BLE	BLE						
Bangor & Aroostook R. R. Co.							BRT	BRT	BRT	BLF&E BRT
Bessemer & Lake Erie R. R. Co.							BLF&E	BLF&E	BLF&E	BLF&E
Boston & Albany R. R. Co.				ORC	ORC	ORC	ORC	ORC	ORC	ORC
Boston & Maine R. R.										
Canadian Pacific Lines in Maine & Vermont										
Central R. R. Co. of N. J.										
Charlestown & Western Carolina Ry. Co.	BLE	BLE	BLE	BLE	BLE	BLE				
Chicago & Eastern Illinois Ry. Co.										BRT
Chicago & Illinois Midland Ry. Co.										
Clinchfield R. R. Co.										
Colorado & Southern Ry. Co.									BRT	
Colorado & Wyoming Ry. Co.									BLF&E	BLF&E
Delaware, Lackawanna & Western R. R. Co.										
Denver & Rio Grande Western									BLF&E BRT	BLF&E BRT
Denver & Salt Lake Ry. Co.		ORC								
Detroit & Mackinac Ry. Co.		BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BLE BRT
Detroit, Toledo, & Ironton Ry. Co.		BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
Detroit & Toledo Shore Line R. R. Co.										BLF&E
Duluth, South Shore & Atlantic Ry. Co.										
Erie R. R. Co.									BRT	BRT
Florida East Coast Ry. Co.	BLE	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E				BLF&E
Georgia R. R.	BLE	BLE								
Georgia Southern & Florida Ry. Co.										BLF&E
Gulf, Mobile & Northern R. R. Co.				BLE						
Gulf & Ship Island R. R. Co.	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE
Illinois Terminal R. R. Co.		BRT	BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
International-Great Northern R. R. Co.										

APPENDIX A.

THE PERIODS INDICATED, THE NAMED RAILROAD BROTHERHOOD HELD CONTRACTS FOR BOTH ITS TRADITIONAL CRAFT
MEMBERS HOLD SENIORITY RIGHTS BUT WHICH IS TRADITIONALLY REPRESENTED BY ANOTHER RAILROAD BROTHERHOOD.

listed the Brotherhood of Locomotive Engineers held the contract for both engineer's and firemen's craft; where
d the Brotherhood of Locomotive Firemen and Enginemen held contract for both firemen's and engineer's craft;
isted the Order of Railway Conductors held the contract for both the conductor's and trainmen's craft; and where
ie Brotherhood of Railroad Trainmen held the contract for both the trainmen's and conductor's craft.)

37	1937–1938	1938–1939	1939–1940	1940–1941	1941–1942	1942–1943	1943–1944	1944–1945	1945–1946	1946–1947	1947–1948	1948–1949	1949–1950
						BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
	BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT					
	BLE												
				BRT	BRT	BRT	BLF&E BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
				BLF&E	BLF&E	BLF&E	BLF&E		BLF&E	BLF&E	BLF&E	BLF&E	BLF&E
	ORC	ORC	ORC	ORC	ORC	ORC	ORC						
									BRT	BRT	BRT	BRT	BRT
										BRT	BRT	BRT	BRT
									BRT				
	BLE	BLE	BLE										
							BRT	BRT	BRT	BRT	BRT	BRT	BRT
										BRT	BRT	BRT	BRT
							BRT			BRT	BRT	BRT	BRT
										BRT	BRT	BRT	BRT
						BRT		BRT	BRT	BRT	BRT	BRT	BRT
							BLF&E	BLF&E	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
										BRT	BRT	BRT	BRT
						BLF&E BRT	BLF&E BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E
												BRT	BRT
							BLE	BLE		BLF&E	BLF&E	BLF&E	BLF&E
	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
							BLF&E	BLF&E	ORC BLF&E	ORC BLF&E	ORC BLF&E	ORC BLF&E	ORC BLF&E
												BRT	BRT
						BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
&E	BLF&E	BLF&E	BLF&E				BLF&E	BLF&E					
							BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E
	BLE												
	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE					
	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
								BRT	BRT				

Gulf & Ship Island R. R. Co.	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE
Illinois Terminal R. R. Co.		BRT	BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
International-Great Northern R. R. Co.										
Lake Superior & Ishpeming R. R. Co.										
Lehigh & New England R. R. Co.			BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E
Long Island R. R. Co.										
Maine Central R. R. Co.										
Mississippi Central R. R. Co.										
Missouri & Arkansas Ry. Co.		BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
Missouri-Kansas Texas										BRT
Missouri-Illinois R. R. Co.						BLF&E	BLF&E	BLF&E	BLF&E	BLF&E
Montour Ry. Co.						BRT	BRT	BRT	BRT	BRT
Monongohela Ry. Co.										BRT
Nashville, Chattanooga & St. Louis Ry.									BLF&E	BLF&E
Nevada Northern Ry. Co.				BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT
New Orleans, Texas & Mexico Ry. Co.										
New York, New Haven & Hartford R. R. Co.					BRT	BRT	BRT	BRT	BRT	BRT
Oklahoma City, Ada-Atoka Ry. Co.			ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC
Pennsylvania R. R.									BRT	
Pennsylvania Reading Seashore Lines									BRT	BRT
Pittsburgh & Lake Erie R. R. Co.										
Pittsburgh & Shawmut R. R. Co.									BLF&E	BLF&E
Pittsburgh & West Virginia Ry. Co.					BRT	BRT	BRT	BRT	BRT	BRT
Richmond, Fredericksburg & Potomac R. R. Co.								BRT ORC	ORC	ORC
St. Louis Southwestern Ry. Co.									BRT	BRT
San Antonio, Uvalde & Gulf R. R. Co.										
San Diego & Arizona Eastern Ry. Co.					ORC	ORC	ORC	ORC	ORC	ORC
Spokane International Ry. Co.										
Texas Mexican Ry. Co.				ORC	ORC					
Texas & Northern Ry. Co.										
Toledo, Peoria & Western R. R. Co.							BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E
Utah Ry. Co.					ORC	ORC	ORC	ORC	ORC	ORC
Virginian Railway Co.										
Western Maryland Ry. Co.										
Western Pacific Ry. Co.									BRT	
Western Ry. of Alabama	BLE	BLE	BLE							

SOURCE: Annual Reports of the National Mediation Board: Table 8 opposite p. 36 in the 1st Annual Report for Fiscal Year ending June 30, 1935; Table 10 opposite 4th; Table 14 opposite p. 27 in 5th, p. 30 in 6th, p. 42 in 7th, p. 43 in 8th, p. 42 in 9th, p. 40 in 10th, p. 51 in 11th, p. 62 in 12th, p. 56 in 13th and p. 56 in 14th; Table Report for Fiscal Year ending June 30, 1950.

BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE						
BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	
							BRT	BRT					
								BRT	BRT	BRT	BRT	BRT	
BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	
								BRT	BRT	BRT	BRT	BRT	
									BRT	BRT	BRT	BRT	
								BRT	BRT	BRT	BRT	BRT	
BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT					
						BRT	BRT						
		BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	
		BRT	BRT	BRT	BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	
						BRT							
					BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	
BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE	BLE BRT	BLE BRT	BLE BRT	BLE BRT	
									BLE	BLE	BLE	BLE	
	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	
ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	
					BRT		BRT	BRT	BRT	BRT	BRT	BRT	
					BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	
								BRT	BRT	BRT	BRT		
					BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BRT BLF&E	BRT BLF&E	BRT BLF&E	
	BRT	BRT	BRT	BRT	BRT	BRT	BRT BLF&E	BRT BLF&E	BRT BLF&E	BRT BLF&E	BRT BLF&E	BRT BLF&E	
				BRT ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	
					BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	
									BRT	BRT	BRT	BRT	
	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	
							BLF&E	BLF&E ORC	BLF&E ORC	BLF&E ORC	BLF&E ORC	BLF&E ORC	
ORC	ORC									BRT	BRT	BRT	
							BRT	BRT	BRT	BRT	BRT	BRT	
			BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	
	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC		ORC	ORC	ORC	
									BLF&E	BLF&E	BLF&E	BLF&E	
							BRT	BRT	BRT	BRT	BRT	BRT	
					BRT								

Board: Table 8 opposite p. 36 in the 1st Annual Report for Fiscal Year ending June 30, 1935; Table 10 opposite p. 29 in 2nd and p. 24 in 3rd; Table 13 opposite p. 32 in in 7th, p. 43 in 8th, p. 42 in 9th, p. 40 in 10th, p. 51 in 11th, p. 62 in 12th, p. 56 in 13th and p. 56 in 14th; Table 12A opposite p. 54 in 15th and p. 70 in 16th Annual